

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED  
JAN 21 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Petition of the SBC Companies for )  
Forbearance from Regulation as a Dominant Carrier ) CC Dkt 98-227  
for High Capacity Dedicated Transport )  
Services in Specified MSAs )

---

COMMENTS OF  
KMC TELECOM, INC.

---

KMC Telecom, Inc. ("KMC") respectfully submits the following comments in response to above-captioned petition filed by the SBC Companies requesting forbearance from regulation as dominant carriers in their provision of high capacity transport services in 14 Metropolitan Statistical Areas ("MSAs") in their service areas.<sup>1</sup>

KMC is authorized to provide, through its subsidiaries, competitive local and long distance services in 18 states, and Puerto Rico, and is operational in eleven states (Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Minnesota, North Carolina, Texas, Virginia, and Wisconsin). KMC has installed state-of-the-art networks in Huntsville, Alabama; Melbourne, Pensacola, Sarasota & Tallahassee, Florida; Savannah and Augusta, Georgia; Topeka, Kansas; Baton Rouge and Shreveport, Louisiana; Greensboro and Winston-Salem, North Carolina;

No. of Copies rec'd \_\_\_\_\_  
List A B C D E

---

<sup>1</sup> *Public Notice*, Petition of SBC Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Fourteen Metropolitan Service Areas, CC Docket No. 98-227 (December 8, 1998).

No. of Copies rec'd 0410  
List A B C D E

Corpus Christi, Texas; Roanoke, Virginia; and Madison, Wisconsin, and will build similar networks in several other cities in the Southeast and Midwest.

**I. THE QUALITY STRATEGIES STUDY DOES NOT SHOW THAT SBC DOES NOT POSSESS MARKET POWER IN PROVISION OF HIGH CAPACITY SERVICES IN THE 14 MSAs IN QUESTION**

**A. Market Share**

SBC's primary argument in support of forbearance from regulation of its provision of high capacity services in the 14 MSAs in question is its contention that its market share of high capacity services in those markets has declined significantly, in some cases to as low as 49%, based on a study by a consulting firm, Quality Strategies, that purports to show SBC's market share of high capacity services in each of these cities.

KMC submits that the Quality Strategies study does not provide sufficiently probative information to warrant any conclusions about SBC's market share in any of these 14 MSAs. First, the Quality Strategies study fails to adequately explain its basis for measuring the high capacity market. It defines the high capacity market as the "universe of DS-1 and above circuits used either for end user customer's traffic (Provider) or for carrier transport (Transport)."<sup>2</sup> Rather than fully explaining the methodology of its study, the Quality Strategies study provides only this statement and then reports the market share results in a completely conclusory fashion. KMC submits that the Commission may not reasonably reach any conclusions on market share

---

<sup>2</sup> "End users utilize high capacity circuits to connect two business locations in the same LATA (point-to-point) or to connect to a carrier's point-of-presence (POP)(special access). Carriers utilize high capacity transport circuits to provide links between POPs, central offices and tandems." Quality Strategies, SBC High Capacity Market Study, 1998, at 2.

absent a more reasoned explanation of the methodology of the study, not to mention the underlying facts relied on in the study and how they were obtained.

Further, it appears most likely that the market share estimates in the Quality Strategies study were made on the basis of DS-1 equivalents. Use of DS-1 equivalents does not provide an accurate or complete picture of competition or market share. In some cases, competitive local exchange carriers ("LECs") are providing to customers primarily DS-3 services and higher, rather than, or in addition to, DS-1 services. A DS-3 service is equivalent to 28 DS-1s. Thus, a 50% market share could be achieved on the basis of DS-1 equivalents when a competitive LEC is providing one DS-3 circuit to one customer in one building in the MSA and SBC is providing 28 DS-1s to 28 separate customers throughout the MSA. While this might seem like a significant competitive market share, using DS-1 equivalents to measure market share glosses over the genuine pattern of competition for high capacity services, ignoring real differences in share of revenues, facilities, or geographic areas served. KMC believes that any estimate of market share of competitive LECs must be based on a more complete picture of market presence than the self-serving and gross measure of DS-1 equivalents.

The Quality Strategies study also fails to justify why it has included a single market share estimate encompassing both end user and carrier customers of high capacity services. KMC is concerned that this approach is also self-serving and glosses over potentially meaningful distinctions in incumbent LEC market power in services provided to end users and carriers.

#### **B. Other Indicia of Market Power**

The Commission has also examined the size and resources of a carrier in assessing market power. SBC's resources vastly exceed those of competitors such as KMC. Further, in

any market within its service territory, SBC's size and resources will also dwarf those that large companies can bring to bear in it since large companies will be spreading available resources among several local service markets. Should it be approved, SBC's request to merge with Ameritech must be considered in assessing size and resources. Accordingly, KMC submits that based on size and resources SBC must be considered to possess market power in provision of high speed services.

In assessing market power, the Commission has also examined supply and demand elasticities concerning provision of the service in question. For the most part, SBC has provided no more than generalized allegations of demand and supply elasticities. KMC submits that the fact that customers of high capacity services are frequently large customers does not show that such customers have significant alternatives for service so that demand for SBC services will be very sensitive to price increases. Similarly, SBC's unsupported allegations do not show that competitive LECs have facilities in place such that they can quickly serve customers that might seek to leave SBC for a competitive carrier. SBCs' broad and conclusory allegations of competition do not show that facilities of competitors are sufficiently extensive or so located in these 14 MSAs that competitors could quickly supply service to customers seeking to switch from SBC.

## **II. THE SBC REQUEST SHOULD NOT BE CONSIDERED SEPARATELY FROM THE *ACCESS REFORM PROCEEDING***

KMC urges the Commission to impose some discipline on the repeated RBOC requests, by means of a number of procedural vehicles, for forbearance from pricing regulation of various

aspects of their provision of interstate access services including their provision of high capacity services. In addition to the instant petition, SBC has asked for forbearance from regulation of high capacity services in its separate biennial review petition<sup>3</sup> and in comments concerning pricing flexibility in the Commission's ongoing *Access Reform Proceeding*.<sup>4</sup> Other carriers have also filed similar petitions.<sup>5</sup> Smaller carriers do not always have the time or resources to participate in the multiple filings necessary to effectively participate in this process. Multiple, repeated filings also strain the resources of the Commission and makes reasoned decision making more difficult.

KMC urges the Commission to summarily deny the separate SBC requests for forbearance on the grounds stated in this petition and determine that the appropriate proceeding for examining deregulation of incumbent LEC provision of high capacity services is the ongoing *Access Reform Proceeding* in which the Commission is directly examining these issues. There, the Commission is seeking to establish an adequate record to permit consideration of pricing flexibility policies for incumbent LECs. In this connection, SBC's contention that the record in that proceeding is stale is simply incorrect since the Commission has recently solicited comments

---

<sup>3</sup> See *1998 Biennial Regulatory Review -- Petition for Section 11 Biennial Review*, Notice of Proposed Rulemaking, CC Docket No. 98-177, FCC 98-238, released November 24, 1998.

<sup>4</sup> *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, CC Docket Nos. 96-262, 94-1, 91-213, 96-263, 11 FCC Rcd 21354 (1996) ("*Access Charge Reform NPRM*").

<sup>5</sup> See, e.g. recent petitions filed by US West, and Bell Atlantic.

to update the record.<sup>6</sup> The *Access Reform Proceeding*, rather than SBC's request for peremptory relief by means of the instant petition, is the appropriate vehicle for considering the myriad subsidiary issues relating to pricing flexibility such as gradations of competition and regulatory relief, and compliance with the marketing opening provisions of the 1996 Act.

### **III. DEREGULATION SHOULD NOT BE GRANTED ABSENT COMPLIANCE WITH THE MARKET OPENING PROVISIONS OF THE ACT**

In the *Access Reform Proceeding*, the Commission envisioned a phased approach to pricing flexibility in which some pricing flexibility could be granted as soon as incumbent LECs have demonstrated that they have opened their markets to competition measured by reference to some appropriate test.<sup>7</sup> Later, when actual, substantial competition had developed greater pricing flexibility could be granted up to and including forbearance of the type envisioned by SBC for high capacity services in this proceeding.

SBC's request for forbearance conveniently ignores the Commission's phased conception of the basis for establishing pricing flexibility and any obligation on its part to comply with the key interconnection, unbundling, resale and other obligations of the 1996 Act designed to achieve local service competition. It is no accident that SBC has ignored this point since it is a long way from complying with an objective measure of opening its markets to competition such as Section 271 of the Act. KMC submits that the Commission could not be

---

<sup>6</sup> *Commission Asks Parties to Update and Refresh Record For Access Charge Reform and Seeks Comment on Proposals For Access Charge Reform Pricing Flexibility*, Public Notice, FCC 98-256, released October 5, 1998.

<sup>7</sup> *Access Reform NPRM*, para. 163.

assured that price deregulation would not enable incumbent LECs to engage in anti-competitive pricing strategies absent both compliance with the Act and the presence of substantial, actual competition. SBC's petition represents little more than another effort to obtain price deregulation far in advance of the time when it would be appropriate to be granted.

#### **IV. THE REQUESTED RELIEF IS TOO BROAD**

SBC's request -- essentially complete deregulation of high capacity services in its specified 14 MSAs -- is far too broad both in terms of geographic scope and relief requested. MSAs can encompass very broad geographic areas. Yet it is entirely possible that competitors may be present in only a small portion of an MSA. A more refined identification of the appropriate geographic scope of pricing flexibility is both feasible and more likely to minimize any prospects of incumbent LECs implementing anti-competitive pricing strategies. For example, the Commission should consider the possibility of implementing pricing flexibility on a central office basis where competitors are actually serving a significant percentage of the market to which the central office could provide service. This approach is feasible and would avoid the risk that incumbent LECs could make up price reductions in competitive areas of the MSA by rate increases in other areas of the MSA, which would be possible under SBC's approach.

In addition, the requested relief is too broad in that it does not tailor regulatory relief to the degree of competition present. The Commission is less likely to grant too much pricing flexibility too soon that could threaten competition if it establishes a phased approach to pricing flexibility as envisioned in the *Access Reform Proceeding* in which various degrees of pricing freedom could be granted in response to greater degrees of actual competition. The Commission

should reject SBC's proposal because it would leap to the end-game of pricing flexibility and prejudge a determination as to the appropriate preconditions for granting pricing flexibility.

## **V. THE SBC PETITION FAILS TO MEET THE STATUTORY STANDARD FOR FORBEARANCE**

Under Section 10(a) of the Communications Act, the Commission must forbear from enforcing a regulatory requirement if (1) enforcement of such regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable; (2) enforcement of such regulation is not necessary for the protection of consumers; and (3) forbearance from applying such regulation is consistent with the public interest.<sup>8</sup>

KMC submits that the Commission could not make these findings in this case. First, for the reasons discussed, SBC has not shown that it lacks market power in provision of high capacity services that would enable the Commission to rely on market forces, rather than regulation, to assure that prices for high capacity services are reasonable. Thus, as discussed, the Quality Strategies study does not present probative evidence of competition in provision of high capacity services and should be disregarded. In addition, the Commission could not conclude that forbearance would be consistent with the public interest. Absent compliance with the market opening provisions of the Act, it would not be in the public interest to substantially deregulate incumbent LECs because there would be no assurance that they could not engage in

---

<sup>8</sup>

47 U.S.C. Sec. 160(a).



conduct that would thwart competition. Accordingly, the Commission must deny SBC's request for forbearance.

## VI. CONCLUSION

For these reasons, KMC urges the Commission to deny SBC's request for forbearance from dominant carrier regulation for provision of high capacity services.

Respectfully submitted,



Patrick J. Donovan

Pamela S. Arluk

Swidler Berlin Shereff Friedman, LLP

3000 K Street, N.W., Suite 300

Washington, DC 20007

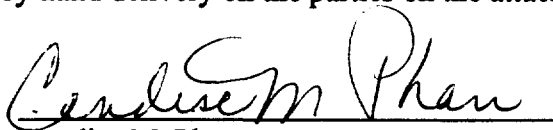
(202) 424-7500

Dated: January 21, 1999

Counsel for KMC Telecom, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of January 1999, copies of the foregoing Comments of KMC Telecom, Inc. were served by hand delivery on the parties on the attached service list:

  
Candise M. Pharr

**VIA HAND DELIVERY**

Magalie Roman Salas, Esq. (original +10 copies)  
Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, SW  
TW-A325  
Washington, DC

**VIA HAND DELIVERY**

Richard Lerner  
Deputy Chief, Competitive Pricing Division  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, SW  
TW-A325  
Washington, DC

**VIA HAND DELIVERY**

Jane Jackson  
Chief, Competitive Pricing Division  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, SW  
TW-A325  
Washington, DC

**VIA HAND DELIVERY**

International Transcription Service  
1231 20<sup>th</sup> Street, N.W.  
Washington, DC 20554